No. 98-1606

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

CHUCK DUNN,

Petitioner,

v.

THE COMMISSION ON PROFESSIONAL COMPETENCE,

Respondent,

JURUPA UNIFIED SCHOOL DISTRICT, *et al.*,

Real Party in Interest.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Real Party in Interest defeat Petitioner's First Amendment claims by demonstrating that the District would have dismissed Petitioner even in the absence of his allegedly protected speech?

2. Was Petitioner afforded due process of law when his public school employer gave him prior notice of the charges for which he was to be dismissed and an opportunity to contest those charges at an evidentiary hearing?

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari ("Petition") accurately listed the parties to the proceedings below except that the individual members of the Real Party in Interest's Governing Board of Trustees were also named as parties in the state court proceedings. The parties not named in the Petition include Sandra Ruane, Mary Burns, Holly Hanke, John Chavez, and Sam Knight. Sandra Ruane and Holly Hanke no longer serve as members of the Real Party's Governing Board. No specific or direct relief was sought by Dunn against these individually named parties.

TABLE OF CONTENTS

	Page
Questions Presented	I
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
A. Dunn's Relationship with Nancy	5
B. Dunn's Conduct Toward His Supervisors, Tieri and Young	6
C. Dunn's Due Process Claims	9
Reasons for Denying the Writ	10
I. Because The District Proved That Dunn Engaged In Independent Misconduct Sufficient To Warrant His Dismissal, Dunn's First Amendment Claims Must Fail.	10
II. Dunn Was Afforded Due Process	15
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Brewster v. Board of Education, 149 F.3d 971 (9th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1252 (1999) 11

Connick v. Myers, 461 U.S. 138, 246, 103 S. Ct. 1684, 75 L. Ed. 843 (1983) 13, 14

Lyons v. Security Pac. Nat. Bank, 40 Cal. App. 4th 1001, 48 Cal. Rptr. 2d 174 (1995) 14

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) 3, 11, 12, 13

Parsons Steel Inc. v. First Alabama Bank, 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986) ... 14

Roe v. City and County of San Francisco, 109 F.3d 578 (9th Cir. 1997) 13

Umbehr v. Board of County Comm'rs, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) 11, 13

Statutes:

28 U.S.C. § 1738 ..... 3, 14

California Education Code § 44932(a)(1) 2

Cited Authorities

Page

California Education Code § 44932(a)(3) 2

California Education Code § 44932(a)(5) 2

United States Constitution:

First Amendment ..... *passim*

Rule:

United States Supreme Court Rule 14(i) 1

Real Party in Interest Jurupa Unified School District, Sandra Ruane, Mary Burns, Holly Hanke, John Chavez, and Sam Knight (hereinafter referred to collectively as "District") respectfully request that this Court deny Petitioner Chuck Dunn's (hereinafter "Dunn") Petition seeking review of the California Court of Appeal decision in this case.

OPINIONS BELOW

On May 9, 1994, arbitrator Kenneth A. Perea, issued a decision, entitled Arbitrator's Findings and Award, in a contractual grievance arbitration upholding Dunn's five (5) day suspension from employment because of his inappropriate communications and conduct toward two of his supervisors, Vince Tieri ("Tieri"), and Principal Alan Young ("Young.") (*See* Appendix To Petition For Certiorari[1] ("App."), pp. 56-83.)

On April 21, 1995, Respondent Commission on Professional Competence ("CPC") issued its ruling that Dunn should be dismissed from employment with the District. The CPC concluded that Dunn should be dismissed from employment on the basis of three completely independent grounds: (1) engaging in immoral conduct; (2) dishonesty; and (3) evident unfitness for service. (*See*

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1. Dunn filed and served upon the District an "Appendix To Petition For Certiorari" which is replete with misspellings, omitted text, duplicate text, and other errors so significant that it is clear that Dunn failed to provide this Court with the accurate record required under Supreme Court Rule 14(i). Consequently, the District requests that this Court exercise its discretion under Rule 14(4) to deny the Petition on this ground alone.

California Education Code §§ 44932(a)(1), (3), and (5), respectively.)

The CPC held that the District established cause for Dunn's dismissal with respect to two entirely different courses of conduct. First, Dunn was dismissed because of his abusive and insubordinate conduct toward his supervisor Tieri and his principal, Young (App., pp. 45-48.) Second, Dunn was dismissed because of his obsessive relationship with a high school student named "Nancy." (App., pp. 43-55.)

In addressing Dunn's claim that the First Amendment protected him from dismissal from employment with the District, the CPC relied upon Arbitrator Perea's decision of May 9, 1994, and the res judicata and collateral estoppel effects of that unappealled and unchallenged decision, as California law required. (*See* App., pp. 11-12, n.5.) The CPC held that the issue of whether Dunn's speech was protected activity was determined against him in the earlier arbitration proceeding and that the arbitrator's decision precluded Dunn from arguing to the contrary in the CPC hearing. Nevertheless, the CPC also independently determined that Dunn's First Amendment defense lacked merit. (App., pp. 49-53.)

Dunn then filed a Petition for Writ of Mandamus in the Superior Court of California, County of Riverside, which was directed against the CPC and the District. The Riverside Superior Court, exercising its independent judgment on the facts and law of the case, denied the Petition for Writ of Mandate. The Superior Court concluded that "all factual determinations of Respondent CPC are supported by the weight of the evidence and that all of its legal rulings were correct." (App., p. 91.)

Dunn filed an appeal before the California Court of Appeal for the Fourth District, Division Two. The Court of Appeal issued its decision on June 5, 1998. (App., pp. 92-147.) The Court of Appeal exercised its independent powers of review in addressing Dunn's First Amendment claims. While Arbitrator Perea and the CPC held that Dunn's speech was not protected by the First Amendment because it did not concern a matter of public importance, the Court of Appeal *took an independent approach and assumed, for the sake of argument, that Dunn's conduct was protected by the First Amendment.* (App., p. 135, "We may assume, without deciding, he [Dunn] is correct" [that his speech was protected.]) Nevertheless, the Court of Appeal held that under *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 [97 S .Ct. 568, 50 L. Ed. 2d 471] (1977) , Dunn's dismissal must stand because the District impliedly showed that it would have dismissed Dunn for his conduct with Nancy and Aaron even in the absence of Dunn's allegedly protected conduct toward Tieri and Young. (App., pp. 135-136.)

Dunn next filed a Petition for Review before the California Supreme Court. Without comment, the California Supreme Court denied the Petition for Review on September 16, 1998. (App., p. 148.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those Constitutional provisions noted in the Petition, this case also involves 28 U.S.C. § 1738, which provides, in pertinent part,

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

This matter involves a dismissal proceeding brought by the District against Dunn, a permanent certificated employee of the District.

Respondent CPC, the statutory authority empowered to conduct a certificated employee dismissal hearing, concluded, after a lengthy hearing, that Dunn should be dismissed from employment on the basis of three completely independent grounds: (1) engaging in immoral conduct, (2) dishonesty, and (3) evident unfitness for service, with respect to two entirely different courses of conduct.

The CPC held that Dunn could be dismissed because of his obsessive relationship Nancy and because of because of his abusive and insubordinate conduct toward his supervisors Tieri and Young. (App., pp. 43-55, "Determination of Issues.")

A. Dunn's Relationship with Nancy

Beginning in the 1990-91 school year and continuing until October 1993, Dunn developed what was characterized by the CPC as "an extraordinary preoccupation with Nancy." (App., p. 25, Finding 21.) The CPC further explained Dunn's behavior toward Nancy:

> . . . [Dunn] became so obsessive of Nancy, her time, her interests, her activities, and her future, that his conduct passed well beyond that expected in an ordinary friendship, in a student-teacher relationship, or even in a parent-child relationship . . .

(App., p. 25, "Finding 21.")

Dunn's immoral conduct with Nancy included: spending an incredible amount of time alone with Nancy without her parents' knowledge (App., p. 25, "Finding 21."); spending approximately $1,419 in less than one and one-half months, buying Nancy clothing, gifts and dinners (App., p. 27, "Finding 23."); providing Nancy with a locking doorknob for her bedroom which was keyed to match the door to his home (App., p. 28, "Finding 24.") and; providing false information to his insurance carrier for the purpose of adding Nancy to his automobile insurance policy. (App., pp. 29-31, "Finding 27.")

Once it became apparent that Nancy was no longer interested in Dunn and that she now had a boyfriend, Dunn became even more obsessed with her. (App., pp. 31-32, "Findings 28 and 29.") Then, in October 1993, incredibly, Dunn called Nancy's boyfriend, "Aaron G." and told him, in pertinent part,

> I [Dunn] care for her [Nancy], and I will do anything for her. If I have to, I will kill you [Aaron] to get you out of the way. Aaron, do you have a reason to play this little game with me?

(App., p. 34, "Finding 32.")

The CPC concluded that the testimony and evidence produced at the hearing supported a determination that Dunn's relationship with Nancy constituted immoral conduct, dishonesty and established his evident unfitness for service. (App., pp. 43-54, "Determinations 1-6.")

B. Dunn's Conduct Toward His Supervisors, Tieri and Young

In addition to his conduct toward Nancy and her boyfriend, the CPC also found Dunn's conduct toward Tieri and Young established, independent from his conduct toward Nancy and Aaron, his dishonesty and evident unfitness for service. (App., pp. 45-53, "Determinations 2-5.")

During the 1991-92 school year, Dunn became upset with a directive he was given by Tieri, Head of the Special Education Department, concerning the disposition of

unspent supply funds. In response to his disagreement with Tieri (and Young, who supported Tieri), Dunn embarked on a pattern of abusive, insulting and insubordinate conduct against his supervisors which he stubbornly refused to cease. (App., pp. 11-14, "Finding 6.")

Dunn became openly hostile to both Tieri and Young and sent them several hostile memos which included personal attacks. In response to such conduct, he was suspended without pay from March 8 through March 12, 1993. (App., p. 82, "Arbitrator's Findings and Award.") However, upon his return from his suspension, Dunn renewed his personal and hostile attacks against Tieri and Young. (App., pp. 15-21, "Findings 8-14.") The CPC correctly concluded that such conduct established Dunn's evident unfitness for service. (App., pp. 45-53, "Determination of Issues 2, and 5.")

The CPC also independently analyzed Dunn's First Amendment claims. The CPC noted in its decision that arbitrator Perea

> determined from the content, form, and context of Respondent's [Dunn] statements and memos published before April 1993 that respondent's "speech was not designed to enable the public to make informed decisions about the operation of their public school system," but was, instead, "a matter of personal concern rather than a matter of public interest" . . .

(App., pp. 52, 79-82.)

In turn, the CPC, using its independent judgment, determined that the primary purpose of Dunn's "speech" was to provoke his supervisors Tieri and Young, or was simply an effort to conduct his private dispute in public. (App., p. 53.)

The Superior Court, exercising its independent judgment, found that all factual determinations by the CPC were supported by the evidence, and that all of its legal rulings were correct. (App., p. 91.)

Upon appeal, Dunn again asserted that his First Amendment rights were violated by his dismissal. Again, the Court of Appeal, like arbitrator Perea, the CPC, and the Superior Court before, held that Dunn's First Amendment claims were invalid.

In this Petition, Dunn asserts, *inter alia*, that the Court of Appeal failed to exercise its independent judgment. However, the Court of Appeal decision itself proves Dunn is wrong. The Court of Appeal, unlike arbitrator Perea, the CPC and the Superior Court, did not simply hold that Dunn's speech was unprotected, but instead assumed, for the sake of argument, that his speech was protected. (App., p. 135.)

However, the Court of Appeal correctly analyzed Dunn's First Amendment claims with reference to the legal standards set forth by this Court. It denied Dunn's claims stating,

> But even assuming constitutionally protected conduct was a substantial factor in the District's decision to dismiss Dunn, the dismissal may stand if the District can show it would have

> reached the same decision even in the absence of the protected conduct. (*Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 [97 S. Ct. 568, 50 L. Ed. 2d 471] (1977); *Williams v. City of Los Angeles*, 47 Cal.3d 195, 206 (1988).

The Court of Appeal affirmed that in its judgment such a showing was made by the District in the CPC hearing. (App., p. 138.)

C. Dunn's Due Process Claims

The Court of Appeal also addressed Dunn's due process claims. Dunn challenged the Court of Appeal decision on the basis that he was not given fair notice by the District that his conduct with regard to Nancy could lead to discipline. The charges against Dunn relating to Nancy included immoral conduct, evident unfitness for service and dishonesty. (App., pp. 149-161, Statement of Charges, ¶¶ 1-28.)

The Court of Appeal held that the Statement of Charges against Dunn was sufficient to notify him of the actions which subjected him to discipline and to provide him with sufficient knowledge to prepare a defense. (App., p. 129.) The Court of Appeal noted that the terms "immoral conduct," "dishonesty," and "evident unfitness for service" have been judicially construed to imply a requirement that these types of conduct indicate an unfitness to teach, and as so construed, are not unconstitutionally vague.

REASONS FOR DENYING THE WRIT

The primary thrust of Dunn's Petition is that his dismissal violated the First Amendment because he was dismissed, in part, for conduct that the courts *should have found* to be protected speech. Indeed, Dunn never admits that none of the courts or triers of fact below found his speech and/or conduct to be protected by the First Amendment.

Dunn also raises two collateral issues, asserting that the law in First Amendment cases is either unclear, or that there is a split between the Federal Circuit Courts of Appeal on an issue relevant to this case. As demonstrated below, both issues are merely red herrings.

I.

BECAUSE THE DISTRICT PROVED THAT DUNN ENGAGED IN INDEPENDENT MISCONDUCT SUFFICIENT TO WARRANT HIS DISMISSAL, DUNN'S FIRST AMENDMENT CLAIMS MUST FAIL.

Dunn argues that he was dismissed for exercising his First Amendment rights because the District charged him with: (1) sending a memorandum, dated April 23, 1993, to Young which included specific personal and offensive comments, and (2) revealing the contents of confidential memos to a newspaper reporter for the Press-Enterprise, and to a fellow teacher.

Dunn further asserts that the Court of Appeal erred in its decision because (1) it failed to exercise its independent judgment when reviewing the trial court's decision; and

(2) it failed to find that Dunn's First Amendment activities were an actual, material, and substantial disruption to the education process. Dunn's assertions fail for at least the following reasons.

First, Dunn completely ignores that fact that the CPC, the Superior Court and the Court of Appeal each independently found sufficient cause to dismiss Dunn even in the absence of his allegedly protected conduct. Dunn's conduct with Nancy and Aaron was considered by the CPC to be more than sufficient to justify his dismissal, and Dunn has never asserted that his conduct toward Nancy and Aaron was protected by the First Amendment. (App., pp. 43-45, 48, Determinations 1 and 3.)

When a public employee alleges that he has been discharged for exercising First Amendment rights, courts must engage in a three-part inquiry: to prevail, a public employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the dismissal. If the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. (*Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Umbehr v. Board of County Comm'rs*, 518 U.S. 668, 116 S. Ct. 2342, 2347, 135 L. Ed. 2d 843 (1996); *Brewster v. Board of Education*, 149 F.3d 971, 979 (9th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1252 (1999).)

Thus, even if a public employee's speech affects a matter of public concern, and it is a substantial factor in a decision to dismiss the employee, the dismissal must stand

if the employer demonstrates that it would have reached the same decision even in the absence of the protected conduct. (*Mt. Healthy, supra*, at 429 U.S. 287, 97 S. Ct. 568, 50 L. Ed. 2d 471.)

As the opinions of the CPC, the Superior Court and the Court of Appeal reveal, the District established that it would have dismissed Dunn because of his conduct toward Nancy and Aaron, even in the absence of his allegedly protected speech. Because, under the authority of *Mt. Healthy, supra*, and its progeny, the dismissal was appropriate even if Dunn's speech was protected, the CPC, Superior Court and Court of Appeal did not have to engage in the useless intellectual exercise of determining whether Dunn's speech was a matter of public concern, or whether his speech constituted a "substantial disruption" of the workplace. Such inquiries are relevant in cases in which the only cause for dismissal is the allegedly protected speech or conduct, but they are completely irrelevant to cases, like the present one, in which the employer has a completely sufficient and independent cause for dismissing an employee. Dunn's suggestion that courts must engage in an analysis of these issues in a mixed motive case where sufficient independent causes exist to justify a dismissal simply reflects his failure to understand First Amendment law, and more important, reflects his unwillingness to accept responsibility for his misconduct toward Nancy and Aaron.

As the Court of Appeal noted in its Opinion,

> Just as we decline to permit school authorities to mask an unconstitutional dismissal behind a statement of valid causes, so we cannot allow a teacher genuinely dismissed for valid causes to

> be reinstated because school authorities were also displeased with his exercise of constitutional rights. If it otherwise a teacher about to be dismissed for valid causes could insulate himself from the dismissal simply by engaging in political activities offensive to his superiors. (*Bekiaris v. Board of Education*, 6 Cal.3d 575, 593, n.12 (1972).).

(App., p. 137.)

Second, Dunn's speech and conduct toward Tieri and Young was not protected by the First Amendment. The CPC found that neither Dunn's memorandum to Young nor his efforts to disclose confidential memoranda to the press or to a fellow teacher related to a matter of public concern. The trial court, ***exercising its independent judgment***, adopted these findings, and the Court of Appeal affirmed that decision, again using its independent review. (App., pp. 137-138.)

In evaluating the First Amendment rights of public employees, the threshold inquiry is whether the statements at issue address a matter of "public concern." (*Roe v. City and County of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997).) If the statements do not address a matter of public concern, then the First Amendment is not triggered at all, and "it is unnecessary . . . to scrutinize the reasons" for the employer's actions. (*Connick v. Myers*, 461 U.S. 138, 246, 103 S. Ct. 1684, 75 L. Ed. 843 (1983)).

Because Dunn's conduct was not protected by the First Amendment, the Court of Appeal did not have to analyze Dunn's dismissal in light of the factors set forth in *Mt. Healthy, supra*, and *Umbehr, supra*.

Third, the CPC also held that Dunn's claims under the First Amendment had already been addressed by Arbitrator Perea who held that Dunn's speech was not protected. (App. pp. 11-12, n.5; and pp. 56-83, generally.) Since Dunn never challenged this legal determination, under California law Arbitrator Perea's decision was entitled to the preclusive effects of res judicata and collateral estoppel. (*Lyons v. Security Pac. Nat. Bank*, 40 Cal. App. 4th 1001, 1015, 48 Cal. Rptr. 2d 174 (1995).) The CPC adopted Arbitrator Perea's ruling which was then subsequently adopted by the Superior Court.

The effect of res judicata and collateral estoppel in this case was to establish, as a matter of law, that Dunn's speech was not protected speech under the First Amendment. Therefore, under *Connick v. Myers, supra*, the First Amendment was not "triggered" at all in Dunn's dismissal, and "it is unnecessary . . . to scrutinize the reasons" for the employer's actions. (*Connick v. Myers, supra*, 461 U.S. at 246, 103 S. Ct. 1684, 75 L. Ed. 843.) Consequently, Dunn should be prevented, by principles of res judicata and collateral estoppel, from even raising this issue before this Court.

This Court is required under 28 U.S.C. § 1738 to give full faith and credit to the decision of the California courts with regard to the issues which were fully and fairly litigated in the arbitration before Arbitrator Perea. (*Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 515, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986).)

Finally, Dunn asserts that the Court of Appeal erred in not reviewing the trial court's decision using its independent judgment. Dunn fails to cite to any portion of the Court of

Appeal decision which actually establishes that the Court of Appeal failed to independently review Dunn's First Amendment claims. As demonstrated in the Statement of the Case, *infra*, the Court of Appeal exercised its independent review of Dunn's First Amendment claims. Perhaps the best evidence of the Court of Appeal's use of independent judgment arose when the Court of Appeal did not automatically adopt the CPC or Superior Court's determination that Dunn's speech was not protected, but instead assumed, for the sake of analysis, that Dunn's speech was protected by the First Amendment. Such an analysis reveals that the Court of Appeal exercised its independent judgment. (App., p. 135.)

II.

DUNN WAS AFFORDED DUE PROCESS

Dunn next challenges the Court of Appeal decision on the basis that he was not given fair notice that his conduct with regard to Nancy could lead to discipline. The charges against Dunn with regard to Nancy included immoral conduct, evident unfitness for service and dishonesty. The Court of Appeal held that the Statement of Charges against Dunn was sufficient to notify him of the actions which subjected him to discipline, and to provide him with sufficient knowledge to prepare a defense. (App., pp. 127-133.)

Dunn essentially asserts that he had no way of knowing that his relationship with Nancy could have resulted in his dismissal because he had maintained other relationships with students and was not warned that such relationships would subject him to discipline. This contention is wholly meritless for two reasons.

First, Dunn's relationship with other students was never in question during his dismissal hearings. He only had to answer for his relationship with Nancy. As the CPC, the Superior Court, and the Court of Appeal all found, Dunn's relationship with Nancy was so imbued with immoral conduct that any reasonable teacher would have known his conduct was unacceptable and could subject him to discipline. For example, it can hardly be argued that a teacher who threatens to kill a student's boyfriend and family has not engaged in conduct for which he could be disciplined. Dunn, who engaged in exactly this conduct, could not be unaware of the potential disciplinary sanctions arising from such conduct. Indeed, as the Court of Appeal noted, Dunn took steps to conceal his actions, and even his relationship with Nancy, which indicated that Dunn knew, before charges were ever filed against him, that his conduct was inappropriate and would subject him to sanctions. (App., pp. 128-129.)

Second, Dunn asserts that the CPC dismissed him on the basis of conduct which was allegedly not set forth in the District's Statement of Charges. (App., pp. 149-166.) However, Dunn fails to cite even a single cause for his dismissal which was not reasonably contemplated and included within the Statement of Charges against him. (Compare Statement of Charges, App., pp. 149-166, with CPC Decision, App., pp. 1-83.)

Third, Dunn was not only dismissed on the basis of conduct in his relationship with Nancy, but he was also dismissed for his dishonesty, and abusive and insubordinate conduct toward Tieri and Young. Dunn does not, and logic dictates that he cannot, assert that he had no way of knowing that dishonesty, and his personal threats and aggression

toward his supervisors would not be grounds for discipline. Indeed, as the record reflects, Dunn was repeatedly warned that his conduct toward Tieri and Young could and would lead to discipline, and he was even suspended five days for such conduct prior to the date on which he was served with the Statement of Charges which led to his dismissal. (App., pp. 11-14, Finding 6.)

CONCLUSION

The Petition before this Court is meritless. While allegedly presenting this Court with valid issues for review, an analysis of these issues reveals only that Dunn is disappointed in not being believed. Fortunately, disappointment with a result is not a sufficient reason to warrant this Court's review. Consequently, the District respectfully requests this Court to deny Dunn's Petition.

Respectfully submitted,

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